

LETTER OPINION
99-L-59

July 23, 1999

Mr. Thomas E. Rutten
Ramsey County Water
Resource District
524 4th Avenue #12
Devils Lake, ND 58301-2490

Dear Mr. Rutten:

Thank you for your letter concerning a possible conflict of interest by a Ramsey County commissioner who is a plaintiff in a lawsuit against a variety of government defendants, including the Ramsey County Water Resource District. As you relate in your letter, the possible conflict of interest would concern the authority and control a board of county commissioners has over a county water resource district when one of the commissioners may have a personal interest or stake in a lawsuit against that county water resource district and its officers, members, employees, and agents.

You indicate that county commissioners exercise direction and control over county water resource districts and their board of managers. However, in a letter from former Attorney General Nicholas J. Spaeth to Jeanne L. McLean (September 1, 1987), Attorney General Spaeth discussed the somewhat limited control a county commission has over decisions made by county water resource districts. I have enclosed a copy of this letter for your information. The letter stated the following:

The managers of a county water resource district are appointed by the county commission. N.D.C.C. § 61-16-08. Once appointed the water managers have significant independence. There is no statute or case law empowering the county commission to supervise water managers, overrule their decisions, or otherwise oversee the operations of the water resource district. In exceptional circumstances, however, a county commission may remove a water manager from office. N.D.C.C. § 61-16-08.

In addition to the power to appoint and remove members of the water resource board, which has not changed since 1985, the board of county commissioners also has the authority to approve, amend, or disapprove the district budget and to levy and authorize a tax to finance the district's operations. N.D.C.C. § 61-16.1-06.

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While it is certainly possible to envision potential conflicts of interest on the part of a county commissioner who is a party to a lawsuit against a water resource district and its officials, your letter does not identify any specific currently existing conflict of interest. Unless or until such a county commissioner is in a position to take specific action in his official capacity which also involves a personal interest or interests on his part, I do not believe a conflict exists. I found no authority for the proposition that a per se conflict of interest arises merely because a local governmental official is a party to a lawsuit also involving a subordinate or related governmental entity as a party.

Moreover, whether a specific conflict of interest exists and comes within the purview of the law is a question of fact to be resolved at the local level. See 1995 N.D. Op. Att'y Gen. 21, 25 (copy enclosed for your information). As one author noted:

The decision as to whether a particular interest is sufficient to disqualify is necessarily a factual one and depends on the circumstances of the particular case. No definitive test has been devised. The question is whether the circumstances can reasonably be interpreted to show that there is a likely capacity to tempt the local official to depart from his or her public duty of acting in the best interests of the community.

Antieau on Local Government Law § 25.08[1] (2nd ed. 1999).

There is now a statutory procedure for abstention of a county commissioner who may have a conflict of interest. N.D.C.C. § 44-04-22 provides as follows:

A person acting in a legislative or quasi-legislative or judicial or quasi-judicial capacity for a political subdivision of the state who has a direct and substantial personal or pecuniary interest in a matter before that board, council, commission, or other body, must disclose the fact to the body of which that person is a member, and may not participate in or vote on that particular matter without the consent of a majority of the rest of the body.

This statute does not apply to all interests a government official may have, but rather only to those interests that are "direct and substantial" and "personal and pecuniary." Id. This statute has been interpreted by a subsequent Attorney General opinion. See 1995 N.D. Op. Att'y Gen. 21.

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In the circumstances you outline in your letter, a potential conflict of interest may arise if, for example, the water resource district presented a budget to the county commission for approval which contained an allocation of funds to pay off a judgment obtained in the lawsuit or to settle the lawsuit. See N.D.C.C. § 61-16.1-06. Similarly, votes could be taken by the county commission to either appoint or remove a water resource district board member or members under circumstances indicating that such appointment or removal related to the conduct or outcome of the pending lawsuit. If such circumstances were to arise, it would be up to the individual county commissioner and the board of county commissioners to determine if a conflict was created by such circumstances and whether under N.D.C.C. § 44-04-20 the particular commissioner may vote on such a matter.

Your letter also asks whether the county commissioner "should be required to resign his position" because of this potential conflict of interest. First, as I have stated previously, I do not believe that an actual conflict of interest exists at this time, although the potential for one certainly does. Second, the Attorney General does not have the authority to require removal of a local official through the opinion process. Procedures do exist for the removal or recall of a county commissioner under certain circumstances; however, the Attorney General does not initiate those processes.

Certain local officials, including county commissioners, are subject to removal by the Governor under N.D.C.C. ch. 44-11 "whenever it appears to the governor by competent evidence and after a hearing as provided in this chapter, that the officer has been guilty of misconduct, malfeasance, crime in office, neglect of duty in office, or of habitual drunkenness or gross incompetency." N.D.C.C. § 44-11-01. According to one treatise, "[c]onflicts of interests by local government officers and employees justify their removal, and the possibility of a conflict of interest may prevent employment in the first instance." Antieau on Local Government Law § 76.20[2] (2nd ed. 1999) (citing Hussey v. Petito, 267 N.Y.S.2d 244 (1966), aff'd, 224 N.E.2d 337, cert. denied, 386 U.S. 1031 (1967)). There is also a process for removal of public officials by judicial proceedings pursuant to N.D.C.C. ch. 44-10.

In addition to removal procedures, certain elected officials of the state and of any county or of any legislative or county commissioner district are subject to recall "by petition of electors equal in number to twenty-five percent of those who voted at the preceding general election for the office of governor in the state, county, or

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district in which the official is to be recalled." N.D. Const. art. III, § 10.

If one of the potential conflicts of interest mentioned earlier should actually arise, it would be incumbent upon the individual county commissioner involved to disclose the fact to the full board of county commissioners pursuant to N.D.C.C. § 44-04-22. The commissioner with the conflict could not then vote on a legislative, quasi-legislative, judicial, or quasi-judicial matter before the board without the consent of the majority of the board. N.D.C.C. § 44-04-22.

I trust this discussion and the enclosed materials will be helpful to you and the other involved parties in handling the situation should an actual conflict of interest arise.

Sincerely,

Heidi Heitkamp
Attorney General

jjf/pg
Enclosures
cc: Lonnie W. Olson, Ramsey County State's Attorney